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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1589 and No. 74-1590

GENERAL ELECTRIC COMPANY,
Petitioner in No. 74-1589,
Respondent in No. 74-1590,

versus

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, et al.,
Respondents in No. 74-1589,
Petitioners in No. 74-1590.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION OF AND BRIEF OF ALASKA AIRLINES, INC., ALOHA AIRLINES, INC., ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INCORPORATED, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., HAWAIIAN AIRLINES, INC., HUGHES AIR CORP., d/b/a HUGHES AIRWEST, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, INC., OZARK AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AIRLINES, INC., SOUTHERN AIRWAYS, INC., TEXAS INTERNATIONAL AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., WESTERN AIRLINES, INC., WIEN ALASKA AIRLINES, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

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COME NOW ALASKA AIRLINES, INC., ALOHA AIRLINES, INC., ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INCORPORATED, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., HAWAIIAN AIRLINES, INC., HUGHES AIR CORP., d/b/a HUGHES AIRWEST, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, INC., OZARK AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AIRLINES, INC., SOUTHERN AIRWAYS, INC., TEXAS INTERNATIONAL AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., WESTERN AIRLINES, INC., WIEN ALASKA AIRLINES, INC., hereinafter referred to as "*Amici* Airlines," and pursuant to Rule 42(3) of this Court, hereby respectfully move for leave to file the attached brief *amici curiae* on behalf of Petitioner, General Electric Company. Written consent to the filing of such brief has been requested of both parties and granted.

APPLICANTS' INTEREST

1. Applicants are major domestic and international U.S. airlines employing over 100,000 women in the airline industry throughout their route systems. Their employment benefit plans and costs of doing business will be dramatically affected if there is an adverse result in this case.

2. Various *Amici* Airlines have been parties defendant in litigation in lower federal courts throughout the country in cases which have raised new and important questions concerning the merits of the exclusion of pregnancy coverage from employer benefit plans.

3. Because these airlines employ large numbers of women of child bearing age, the decision in this case could have a major impact on the future economic health of these companies, a number of which have already suffered net losses of millions of dollars in recent years. It is in the public interest that they be allowed to present their views to this Court.

QUESTIONS OF FACT AND LAW WHICH HAVE NOT BEEN AND PROBABLY WILL NOT BE ADEQUATELY PRESENTED BY THE PARTIES

Amici Airlines believe that the following questions of fact and law have not been, and there is reason to believe they will not be, adequately presented in the briefs of the parties:

1. Whether the issue is at present properly framed so as to reflect the real question before this Court, to-wit: whether under the fringe benefit plan under scrutiny, men receive an unfair advantage in compensation over women or whether fringe benefits as a whole are fairly equivalent between the sexes.

2. Whether, in light of the fringe benefits analysis advanced here, the lower court properly interpreted this Court's holding in *Geduldig v. Aiello*, 417 U.S. 484 (1974).

3. Whether in light of Congressional intent, as expressed in related legislation concerning sex discrimination, such as the proposed Equal Rights Amendment, the lower court properly construed Title VII of the Civil Rights Act of 1964.

4. Whether the EEOC guidelines of April 5, 1972 concerning employment policies relating to pregnancy and childbirth are entitled to any deference since they are the product of naked administrative fiat.

5. Whether the policies under attack are justified by business necessity sufficient to constitute a defense under Title VII.

The questions of law and fact which *Amici* Airlines desire to brief are extremely relevant to the issues in this case, especially the problem created by the fact

that a large percentage of women who go on maternity leave fail to return to work once the baby is born.

For the foregoing reasons, it is respectfully requested that this Court grant *Amici* Airlines leave to file a brief as a*mici curiae*.

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SUMMARY OF ARGUMENT

Title VII requires equality in the compensation which an employer provides employees of both sexes. Total compensation is composed of wages and fringe benefits. Equality of wages is not an issue in this case. The test for determining whether equality exists in fringe benefits is whether the value of the fringe benefits are *fairly equivalent* for employees of each sex. In

the absence of a showing of pretextual motivation, the particular benefits provided are irrelevant to the issue of sex discrimination within the meaning of Title VII. Since equal benefits are provided for both sexes and since it costs an employer more to provide these benefits for women, the fringe benefit programs involved in this case certainly do not discriminate against women.

Since the proper test in a Title VII case involving fringe benefits is whether the benefits to the two sex groups are *fairly equivalent* based on the per capita costs of the plan, this Court's holding in *Geduldig v. Aiello*, 417 U.S. 484 (1974) is dispositive of the issues in this case. In *Geduldig* the California disability plan was supported by contributions from workers of both sexes. In this case, the funds spent on premiums for the disability plan are funds allocable to the cost of labor the same as are wages. The substantial increase in cost which would follow the inclusion of pregnancy would be borne by *all* workers, both male and female, in a reduction of the employee benefit dollars available. Added benefits flowing from these added costs could flow only in favor of a small group of workers who, by definition, must be women. On the other hand, the acturial benefits derived from the exclusion of pregnancy coverage, flow to all employees. This important factor is the same one which led this Court to hold that such a practice was not sex based and therefore could not constitute invidious sex discrimination.

Since the legislative history of Title VII's prohibition against discrimination based on sex is extremely sparce, it is necessary to examine more recent ex-

pressions of Congressional intent in the area of women's rights. In the 1970 and 1971 Congressional debates surrounding the proposed Equal Rights Amendment, it was understood that reasonable classifications based on characteristics unique to one sex would remain proper if the Amendment were ratified. Congressional proponents of the Equal Rights Amendment continually explained that laws *concerning physical characteristics unique to one sex*, such as *child-bearing*, would not be laws which discriminated on the basis of sex. It is difficult to imagine that by the last minute inclusion of sex discrimination among the prohibitions of Title VII, Congress intended to enact the sweeping change suggested here.

Much reliance has been placed, by the lower courts in this case and others, on the April 5, 1972, EEOC Guidelines concerning employment policies relating to pregnancy and child birth and "great deference" has been paid to those guidelines in earlier proceedings in this case. As is clear from the circumstances under which those guidelines were issued, they are *in fact* entitled to *no* deference whatsoever because they were issued after *no* studies or investigations, without any procedural protections or public hearings, and are the product of naked administrative fiat.

Even if the non-inclusion of pregnancy in a sickness and accident disability plan constitutes a sex-based classification, this non-inclusion is lawful since it is mandated by business necessity. An employer's substantial interests in maintaining the financial integrity of its sickness and disability programs and in structuring these programs upon in-

surance concepts are sufficient to constitute a defense of "business necessity" as that term has been judicially developed. For these reasons, there is no violation of Title VII in this case.

ARGUMENT

I.

The Non-Inclusion Of Pregnancy Among The Covered Disabilities In A Sickness And Accident Disability Program Does Not Constitute Sex Discrimination Absent A Showing Of Pretextual Motivation.

A. *Title VII requires equality in a fringe benefit program as a whole and does not require the inclusion of any particular benefit.*

The *Amici* Airlines respectfully submit that the analysis of the issue in this case has heretofore focused on only one element of a comprehensive method of compensation — wages and fringe benefits. Assuming that an employer provides equal wages for equal work, the true issue becomes whether an employer's fringe benefit program taken as a whole discriminates on the basis of sex. One aspect of a fringe benefit program may be disability insurance, and pregnancy is simply one potentially compensable condition of such a program. Absent an allegation and proof of pretextual motivation, it is impossible to determine whether the inclusion or non-inclusion of any particular condition in a disability program is discriminatory without examining the *entire* program.

Fringe benefits are nothing more than an indirect form of compensation which an employer provides for employees. *Amici* submit that the correct rule, which this Court should adopt can be stated as follows:

> **So long as the value of the fringe benefits provided by an employer are *fairly equivalent* for employees of each sex, the particular benefits provided are irrelevant to the issue of sex discrimination within the meaning of Title VII unless the inclusion or non-inclusion of a particular benefit is a "mere pretext" for discrimination.**

This rule is thoroughly consistent with the statute, with the congressional history in the area (including the ERA), with Fourteenth Amendment standards, and furthermore keeps the courts out of the quagmire of picking and choosing among every possible benefit which does not fall evenly on all employees. As the record in this case shows, and as simple logic dictates, almost all benefits when reduced to the smallest unit are enjoyed more by one sub-group of employees than by another.

It is basic economics that the value of the risk protection provided to *all* employees is equal to the cost of providing such protection. When the value of that program is broken down between male and female employee groups, it is apparent that female employees have a greater expectation of use value

than males. Since the cost of insurance is directly related to the actuarial expectation of use of the benefits provided, it necessarily follows that General Electric is incurring higher costs per capita in providing protection for their female employees than for male employees. To require an employer to increase this disparity in compensation under the rubric of equality is nonsense. *The purpose of Title VII is not to favor one class of employees over another but to require equality of treatment.*

Notwithstanding the substantial evidence presented by General Electric on this point, the district court misconstrued the meaning of equality under Title VII:

> "Provision of a marginally greater economic benefit to women, if such it is, in the form of pregnancy disability benefits within an otherwise all inclusive disability program, cannot reasonably be considered more favored treatment. If it be viewed as a greater economic benefit to women, then this is a simple recognition of women's biologically more burdensome place in the scheme of human existence . . . If Title VII intends to sexually equalize employment opportunity, there must be this one exception to the cost differential defense." *Gilbert v. General Electric Company*, 375 F. Supp. 367, 383 (E.D. Va. 1974).

Such an interpretation of Title VII is indefensible for at least two reasons. Nowhere in the legislative history or the language of the statute itself can there

be found a hint that Congress intended in enacting Title VII to provide greater compensation for women than for men. Moreover, it is impossible to impute to Congress an intention only to provide pregnancy benefits for those workers who work for companies large enough to afford, and voluntarily choose to have sickness and accident disability programs. *Nowhere has it been suggested that the language of Title VII would require an employer who did not provide sickness and accident disability benefits to institute such a program so that pregnancy could be included.*

In General Electric's plan no fringe benefits are provided for male employees which are not also provided for female employees when analogous benefits for physiological characteristics unique to each sex are taken into account. Likewise, no fringe benefits are provided for female employees which are not also provided for male employees.

By focusing on the narrow issue of pregnancy benefits, the Court below has missed the importance of the meaning of equality in the entire area of fringe benefits. The Court of Appeals for the Fourth Circuit held that an employer must provide disability insurance benefits for its employees who become pregnant if the employer provides disability insurance benefits for illness or other disabilities. With appealing simplicity, the Court noted that since only women can become pregnant, the G.E. plan:

> ". . . is manifestly one which can result in a less comprehensive program of employee

> compensation in benefits for women employees than for men employees; and would do so on the basis of sex." 519 F.2d at 664.

It is neither the purpose of Title VII *nor is it necessary to this Court's interpretation of the Act,* to shape the parameters of an employer's disability insurance program item by item. Some conditions will occur only in women, some only in men; some will be more prevalent in women, some more prevalent in men; and some will occur equally in both sexes. The law requires equality of treatment of employees and forbids favoring any class of employees on the basis of the impermissible classifications of race, color, religion, sex or national origin. Equality on the basis of sex under Title VII requires that an employer compensate men and women performing the same or similar jobs equally. ***Equality in direct compensation (wages) must not be destroyed by inequality in indirect compensation (fringe benefits).***

If the payments made by an employer to provide benefits for male and female employees, and the resulting values of those benefits to the employees, are *fairly equivalent,* then the fringe benefit program does not discriminate on the basis of sex within the meaning of Title VII. If wages are also nondiscriminatory, then the employer is compensating male and female employees equally. There is no need for further judicial scrutiny if these conditions are met.

The test proposed above is similar to the approach taken by the EEOC and the courts in evaluating

employment tests under Title VII. An employer is not required to establish the validity of an employment test *until* it is shown that the test has a disparate impact on a particular class of employees. *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971). Likewise, *an employer should not be required to justify the item-by-item makeup of his disability insurance program until it is shown that that program provides disparate compensation for one class over another.* In the absence of a showing of pretextual motivation, judicial scrutiny of a fringe benefit program should end when it has been determined that the value to the employees of the payments by an employer to provide the insurance are fairly equivalent for each class of employees. When this standard is applied to disability insurance programs, it is clear that these programs do not discriminate against women. The simple fact is that *it now costs more for an employer to provide the type of insurance involved in this case for women than it does for men,* even *without* any additional benefits for pregnancy.[1]

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1 Actuary Paul Jackson, a Fellow in the Society of Actuaries, who has worked in the area of disability insurance coverage since 1956 testified without contradiction in this case concerning the insurance industry practice and experience with respect to disability insurance. His testimony showed that approximately 40 percent of the work force in the United States under age 65, or some 32,000,000 employees, are covered by sickness and accident disability insurance. The benefit periods of this insurance vary: about 45 percent of the plans provide for 13 weeks benefit coverage; 50 percent provide coverage for 26 weeks; and only 5 percent provide coverage for 52 weeks. Only 40 percent of these plans, covering about 12,800,000 employees, provide a pregnancy benefit, and such coverage is almost always limited to six weeks. The cost per unit of benefit under the existing insurance plans for a female employee is approximately 170 percent of that for a male employee even where no maternity benefit is provided; where a six-weeks maternity benefit is provided, the female cost per unit of benefit runs up to 210 percent of the male employee cost; and the latter percentage goes up to 300-330 percent of the male employee cost per unit of benefit where full maternity coverage is provided.

B. ***The inclusion of pregnancy in a disability insurance program would force the restructuring or abolition of fringe benefit programs to maintain the equality that presently exists.***

The inclusion of pregnancy benefits in a disability insurance program is not a minor adjustment. It is a major expense in the aggregate which is not normally included in disability policies. The evidence in this case shows the estimated annual cost of adding maternity benefits to the sickness and accident disability income plans currently in effect in the United States to be over $1,000,000,000.

Employers and employees have an obvious interest in maintaining the financial integrity of their disability insurance programs. The purpose of these plans is income protection during a temporary period of disability at an affordable cost. *Unlike other conditions, pregnancy often represents a permanent change in status from employee to non-employee.* Between forty and fifty percent of female employees who have children do not return to work following the birth of their child. For these employees, pregnancy does not represent an interruption in their employment but rather a change from a full-time employee to a full-time parent. To provide disability benefits to employees who desire to leave their employment to raise a family would amount to a massive form of severance pay. Such a result is patently unfair to the employer and the remaining employees who are seeking income protection for temporary disabilities. It is self-evident that there is no reliable way to determine

which employees would return following childbirth and which would not. The point is not that some persons would abuse the program — the point is that the cost of these programs would be substantially increased to provide benefits *which would accrue to a large number of non-employees.* It simply is not possible for pregnancy benefits to be provided without drastically increasing the cost and affecting the purpose of existing disability insurance programs.

Because females normally receive a larger share of the benefit dollar even in disability plans which do not include pregnancy, the inclusion of pregnancy as a compensable condition would increase the disparity in compensation between men and women. Since Title VII proscribes sex discrimination and not merely sex discrimination against women, it is doubtful that it will be long before male employees begin challenging such benefit programs on the ground that they result in discriminatory higher compensation of women than men. Indeed, similar attacks have already begun. *See, e.g., Board of Regents v. Dawes,* ___ F.2d ___, 27 W.H. 453 (1975).

In response to such a challenge in the fringe benefit area of compensation, employers will be faced with the dilemma of having to reduce some other benefits to women or increasing the benefits paid to men. The employer may opt to avoid the entire problem by simply abandoning its disability insurance program and increasing wages accordingly so that employees could purchase their own disability insurance. *Title VII only requires equality. It does not require an employer to provide any fringe benefits at all — in-*

cluding disability insurance. This option vividly displays the fallacy in the argument that an employer's disability insurance must include maternity benefits

> ***If* it is not discriminatory for an employer to have *equal wages* and no insurance program (allowing employees of either sex to purchase whatever coverage they desire), *then* it must not be discriminatory for an employer to have *equal compensation* consisting of equal wages and equal fringe benefits.**

Otherwise, an employer who provided no insurance program would have to increase the wages of female employees so that they could purchase pregnancy disability insurance. Title VII was never intended to require the anomalous result of higher wages for women than for men. There simply is no need for this Court to examine the particular benefits which employers and employees have decided to purchase as part of the fringe benefit program. Once this Court determines that total compensation, including wages and fringe benefits, is equal for male and female employees, the requirements of Title VII have been met. The *Amici* Airlines respectfully submit that the only *workable test* for determining whether equality in fringe benefits exists, which can be clearly understood and administered fairly and easily by both employers and the courts, is a test which focuses on the value of the benefits provided. If these values are fairly equivalent for both sexes, equality exists and the requirements of Title VII have been met.

C. The Issue in this Case has Already Been Determined by this Court in Geduldig *vs.* Aiello

The Fourth Circuit Court of Appeals held that this Court's opinion in *Geduldig v. Aiello,* 417 U.S. 484 (1974), is not controlling authority with regard to the issues in this case. Both cases involved the permissibility of the non-inclusion of coverage for disability from pregnancy in a sickness and accident disability plan. Although the plans were essentially the same, in *Aiello* the manager of the plan was the State of California whereas here it is a private employer. The Court of Appeals grounded its holding on distinctions between Fourteenth Amendment "standards" and Title VII "standards" and stated:

> There is a well-recognized difference of approach in applying *constitutional* standards under the Equal Protection Clause as in *Aiello* and in the statutory construction of the "sex-blind" mandate of Title VII. 519 F.2d at 667.

The Court of Appeals obviously felt that while situations could exist in which a state might lawfully carry on a discriminatory practice, it did not follow that a private employer could lawfully carry on the same discriminatory practice. This analysis may be correct as far as it goes.[2] *Amici* Airlines do not contest

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2 Prior to this case, the rule in the Fourth Circuit was *contra.* Judge Widener, in his dissent in this case, pointed out that the Fourth Circuit rule was that, "the test of validity under Title VII is not different from the test of validity under the fourteenth amendment." 519 F.2d at 669. Indeed, as Judge Widener points out, that rule is widely followed. See 75 Col. L. Rev., 441, 464, 467 (1975).

that there may be different tests under the Equal Protection Clause and Title VII to determine whether a discriminatory practice is lawful.

If *Aiello* had held that the practice there under scrutiny was sexually discriminatory but was justified because of some compelling governmental purpose, then that case would not necessarily have any precedential value here. But such was simply not the case.

1. *Two-Step Analysis.*

Though the laws governing sex discrimination in this country are different in certain major respects,[3]

3 Charges of sex discrimination may be examined under several laws of the United States. As in *Geduldig*, the permissibility of discrimination on the basis of sex by the states is governed by the Equal Protection Clause of the 14th Amendment, while the permissibility of such discrimination on the part of the federal government is controlled by the 5th Amendment. Similarly, the extent to which private employers may discriminate on the basis of sex in hiring, compensation or wages is governed by Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. Using these various laws as weapons, women are attacking stereotyped barriers of entry into what was heretofore a male-dominated employment market.

Some forms of differentiation on the basis of sex are legally permissible, however, and under each of the laws mentioned above, certain defenses are available to a party charged with sex discrimination. Thus, a state may show that it is not in violation of the Equal Protection Clause of the 14th Amendment when it establishes a discriminatory classification based on sex by showing that the classification had a "rational basis" or that its resulting discrimination is justified by a "compelling state interest." These same defenses are available to the federal government under the 5th Amendment. Likewise, under Title VII of the 1964 Civil Rights Act, an employer may justify discrimination on the basis of sex if it is the result of a bona fide occupational qualification or is required by overriding business necessity. An employer may also discriminate in pay between employees of different sexes provided that the system under which the pay differentials are calculated is one which measures earnings by quantity or quality of production.

under each there is a two-step analysis. The threshold question for each is the same — whether the act or practice complained of constitutes discrimination on the basis of sex. If the answer to the threshold question is in the affirmative, then the party accused may interpose a defense of justification, the type and extent of justification required being governed by the particular law under which the action is brought. If, and only if, this Court is convinced that the non-inclusion of disability resulting from pregnancy in an employee sickness and accident disability program constitutes discrimination on the basis of sex, does it then become necessary to consider whether such sex discrimination is of the unlawful variety.

In *Aiello*, this Court definitively rejected Respondents' position by recognizing that classifications involving pregnancy distinguish between pregnant and non-pregnant persons — not between men and women. In deciding that case, this Court necessarily discussed the appropriate constitutional standard to be applied in determining whether California's insurance program should be upheld. In that regard, it is important to note that a state must justify any classification — not just sex-based ones — with a rational basis or a compelling state interest. This need flows from the fact that although the Title VII classifications of race, color, religion, *sex* or national origin are covered under The Fourteenth Amendment, that constitutional provision is broader and all classifications are subject to its strictures. It was only in response to the assertion in the dissenting opinion that the failure to include pregnancy in disability coverage "inevitably con-

stitutes sex discrimination," 417 U.S. at 501, (Brennan, J. dissenting), that the majority examined the nature of the distinction. That view was expressly rejected.

2. *The Phrase "Discrimination on the Basis of Sex" has one meaning.*

In order to prevail, Respondents must convince this Court that the words "discrimination on the basis of sex" mean something different when the Fourteenth Amendment is involved than they do when Title VII comes into play. They must also convince this Court than a plan which already provides greater per capita benefits to women is discrimination *against* women. In this regard, the cases which hold that Title VII "standards" are different than Equal Protection "standards" are inapposite.

It is not here asserted that once an event of sex discrimination is found that this Court must apply the same standards for determining its permissibility under both laws. It *is* asserted that a determination by this Court that a practice does not constitute "discrimination on the basis of sex," as a statement of logic, requires the application of the same logical equation to the *same practice* when the statutory proscription is against discrimination on the basis of sex. Such an equation was set forth in *Aiello:*

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed*, 404 U.S. 71, and *Frontiero v. Richardson*, 411 U.S. 677, involving discrimination based on gender as such. The California insurance

> program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to affect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this one on any reasonable basis, just as with respect to any other physical condition. The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups — pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes. 417 U.S. at 496 n. 20.

The bearing of this statement on Title VII cases becomes more striking when one considers that facially neutral policies or practices are also illegal

under the Act if they are "mere pretexts" for discrimination. *McDonald Douglas Corp. v. Green, supra*. It was thus open to the Respondents in this case to allege and prove that General Electric's facially neutral practices are mere pretexts for unlawful sex discrimination. To the contrary, General Electric introduced overwhelming evidence that its disability insurance program is soundly based on non-pretextual factors which cannot be linked to sex discrimination.

As was advanced in the initial section of this brief, a fringe benefit plan is not discriminatory in favor of one sex if the *benefits* to the two sex groups are "fairly equivalent" based on the per capita cost of the plan. Thus a decision to include or not to include a particular benefit or to extend or to extract coverage of disabilities by an employer does not require judicial scrutiny *unless one sex derives an unfair benefit over the other*. In *Aiello* this Court found it important that the substantial increase in cost which would accompany inclusion of normal pregnancy among the covered disabilities in the California plan would have to be borne by the non-pregnant citizens of California — both male and female. *Aiello, supra* at 496. This important factor is equally present when the plan is operated by a private employer. To assume that it would be the employer alone and not the employee-beneficiaries of the plan who would bear the staggering costs of pregnancy inclusion, omits entirely the give and take of the revenue allocation process and is in fact nothing more than economic naiveté.

Any business has a finite amount of money available for distribution to all those with an interest

in the revenue of the business. Suppliers, lenders, owners and employees all share in those funds. Premiums paid the employer on sickness and accident policies are attributable to the employee share of revenue along with salaries, wages and other fringe benefits.

Additional funds expended on higher premiums, which would accompany the inclusion of pregnancy benefits are funds which employees, male and female, might otherwise have received in the form of higher wages or other benefits. Those higher wages and benefits must, under Title VII, inure to employees of both sexes.

The individual Plaintiff in this case is in exactly the same posture as the Appellee in *Aiello*. In regard to her claim this Court stated:

> The Appellee simply contends that, although she has received insurance protection equivalent to that provided all other participating employees, she has suffered discrimination because she encountered a risk that was outside the program's protection. *Aiello, supra* at 497.

In sum, the distinctions which Respondents attempt to draw between *Aiello* and this case are *distinctions without differences*. Under the Fourteenth Amendment citizens are guaranteed equal protection under state laws. Under Title VII citizens are guaranteed equal opportunity from their employers. It is submitted that *Aiello* was not written in a vacuum, but

with an eye to Title VII cases to come.[4] Its holding is consistent with the purpose of the 1964 act — to equalize opportunity, not to create an advantage for either men or women.

II.

The Legislative History Of Title VII And The Proposed Equal Rights Amendment To The Constitution Supports The View That The Failure To Include Pregnancy Benefits Here Is Not Unlawful.

As is known to this Court, the legislative history of Title VII's prohibition against discrimination based on sex is extremely sparse. The House debate on the sex discrimination amendment covers only nine pages in the Congressional Records.[5] The problem presented in this case was not anticipated during that brief debate, although one of its proponents, Congresswoman St. George, did state that women do not seek or need "special privileges" of the type sought here.[6] Senator Humphrey, manager of the pending Senate bill, commented at one point that, "differences of treatment in industrial benefit plans, including

4 519 F.2d at 669 (Widener, J. dissenting). Footnote 21 of the majority opinion in *Aiello* supports this reading. There it was stated "Indeed, the Appellant submitted to the District Court data that indicated that both the annual claim rate and the annual claim cost are greater for women than for men. As the District Court acknowledged, 'women contribute about 28 percent of the total disability insurance fund and receive back about 38 percent of the fund in benefits.' 359 F. Supp. 792, 800. *Several amici curiae had represented to the Court that they had had a similar experience under private disability insurance programs.*" 417 U.S. at 497 (Emphasis supplied).

5 110 Cong. Rec. 2577-2584 (1964). *See generally*, Note, "Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964." 1968 Duke L.J. 671.

6 110 Cong. Rec. 2581 (1964).

earlier retirement options for women, may continue in operation under this bill if it becomes law."[7] Certainly, these remarks strongly suggest that Congress wisely recognized that the inherent differences between men and women would justify certain distinctions which employers could make with regard to benefit plans. What Congress in effect said was that Title VII's sex discrimination provisions did not reach those particular situations where men and women were not similarly situated.

There are some, including the EEOC, who feel that these earlier expressions of congressional intent are outmoded in light of the changes in societal attitudes toward women. However, these proponents of the expansion of rights and privileges for women ignore a much more recent and explicit expression of the Congressional mind.[8] In 1970 and 1971, Congress considered the proposed Equal Rights Amendment to the Constitution ("ERA"). During the hearings and debates on the ERA, which, if adopted will overlap Title VII in many respects, much was said about the concept of sex discrimination in a situation where members of the two sexes were *not similarly situated*. For example, fourteen members of the House Committee on the Judiciary who supported the version of the ERA which was ultimately approved by both Houses of Congress stated as their Separate Views:

7 110 Cong. Rec. 13663-4 (1964).

8 The practice of looking to analagous legislative activity to glean the general legislative understanding of any given provision was sanctioned by this Court in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973).

> ". . . the original resolution does not require that women must be treated in all respects the same as men. 'Equality' does not mean 'same.' As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example, law providing for payment of the medical costs of child-bearing could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative." H.R. Rep. No. 92-359, 92d. Cong., 1st Sess. 7 (1971).

This understanding was adopted by the majority Report of the Senate Committee on the Judiciary,[9] by the authors of the ERA[10] and by various constitutional scholars and commentators.[11] Proponents of the ERA continually explained that laws concerning wet-nurses, sperm banks, *child-bearing*, forcible rape and other matters related to physical characteristics unique to one sex are not laws which discriminate on the basis of sex. Thus, a classification dealing with pregnancy in a separate manner, consistent with the general concepts set forth above, is not a scheme within the Congressional mind which discriminates on the basis of sex.

9 S. Rep. No. 92-689, 92nd Cong., 1st Sess. 11 (1971).

10 Hearings on H.J. Res. 35,208 and Related Bills, and H.R. 916 and Related Bills, before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 92nd Cong. 1st Sess. 40 (1971).

11 *E.g.*, T. Emerson, Hearings on S.J. Res. 61 S.J. Res. 231 before Committee on Judiciary, U.S. Senate, 91st Cong., 2nd Sess. 430, n. 7 (1970).

III.

The Sex Discrimination Guidelines Issued By The EEOC On April 5, 1972 Concerning Employment Policies Relating To Pregnancy And Childbirth Are Not Entitled To Any Deference In The Decision Of This Case Because They Are The Product Of Naked Administrative Fiat.

The Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.*, went into effect on July 2, 1965. Guidelines on Discrimination Because of Sex were originally issued by the EEOC on November 24, 1965;[12] they were amended first on February 21, 1968;[13] again on August 19, 1969;[14] and were last amended and revised effective April 5, 1972.[15] Prior to the last revision, the Guidelines expressed no view whatsoever with respect to the way disabilities resulting from pregnancy or childbirth were to be treated. However, in a series of opinion letters issued contemporaneously with the passage of Title VII and adhered to consistently up to 1972, the EEOC repeatedly stated its position that it was not necessary that pregnancy be included. For example, in an opinion letter issued in 1966, General Counsel Charles Duncan succinctly explained the EEOC's position on the issue:

> ". . . The Commission policy with respect to pregnancy does not seek to compare an

12 30 Fed. Reg. 14926.

13 33 Fed. Reg. 3344.

14 34 Fed. Reg. 13367.

15 37 Fed. Reg. 6835.

> employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. . . . We do not believe an employer must provide the same fringe benefits for pregnancy as he provides for illness . . ."

On the specific question before this Court as to whether pregnancy need be covered under disability insurance benefit plans, Mr. Duncan set out the EEOC's position in another opinion letter "issued pursuant to 29 C.F.R. 1601.30":

> ". . . An insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory." (Excerpt from an EEOC opinion Factor dated November 10, 1966.)[16]

General Counsel Opinion Letters are considered to be interpretations of Title VII by the Commission. *Williams v. New Orleans S.S. Association*, 341 F. Supp. 613, 615-616 (E.D. La. 1972). Absent more, and since the opinion letters are reasonably contemporaneous with the Act, and consistent with each other, they are entitled to "great deference" by the courts. *National Labor Relations Board v. Boeing Company*, 412 U.S. 67, 75 (1973).

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16 Certain of the Opinion Letters issued in 1966 regarding the instant question were published in the CCH Reporting Service. *E.g.*, CCH EPG ¶ 17,304.43.

Notwithstanding its prior interpretations of the Act with regard to the pregnancy benefits question, the EEOC suddenly reversed itself and issued revised guidelines on April 5, 1972. These are the guidelines which respondents here assert are entitled to "great deference." As will be shown, these guidelines are not entitled to any deference. These radically different "guidelines," which obviously will have a major economic impact on the business sector, were developed in a factual vacuum with no respect whatsoever for necessary procedural safeguards and with absolutely no investigation whatsoever.

The Chief of the Legislative Council Division of the EEOC at the time these guidelines were published was Mrs. Sonia P. Fuentes, who had held that position for several years before the guidelines were issued. (See testimony of Mrs. Fuentes, attached hereto as Appendix A, pages 1a through 8a, *infra*.) The Office of Legislative Council was responsible for drafting rules, regulations and guidelines in the area of sex discrimination and other related matters. Thus, this office was responsible for preparing the 1972 guidelines. (Page 8a)

In an early case, following the issuance of the new Guidelines, *Newmon v. Delta Air Lines, Inc.*, 374 F. Supp. 238 (N.D. Ga. 1973), where the precise issue before this court was considered, Mrs. Fuentes (as the author of the "Guidelines"); was subpoenaed and testified by deposition concerning the issuance of the guidelines by the Commission. In considering what effect those guidelines were to have on the case before him, Judge Henderson concluded that they were not

Communication Workers of America v. American Telephone & Telegraph Company, 379 F. Supp. 679 (S.D.N.Y. 1974), at a hearing held expressly to consider the impact of *Aiello* in a Title VII setting. In response to a question posed by Judge Knapp as to whether exclusion of pregnancy benefits from a disability or medical expense plan would constitute sex discrimination if the contract at issue were negotiated by an all female union, the EEOC acknowledged that it would not.[20] If however, the omission of pregnancy coverage alone from a benefit plan constitutes a *per se* sex discrimination under Title VII, then the origin of the plan or the composition of the work force should be irrelevant. Indeed, the rule in the Fourth Circuit, and elsewhere, is clearly set forth in the case of *Robinson v. Lorillard Corporation*, 444 F.2d 791 at 799, where the court stated:

> The rights assured by Title VII are not rights which can be bargained away — either by a union, by an employer, or by both acting in concert.

This particular quote was cited with approval in the District Court opinion in this case. 375 F. Supp. at 382. The only conclusion to be drawn then is that, without more, the non-inclusion of pregnancy in a disability plan is not sex discrimination in violation of Title VII.

The mere fact of the existence of such an administrative determination, supposedly entitled to "great deference" necessarily leads one to an ex-

20 The colloquy with the attorney for the EEOC appears at pp. 28-30 of the transcript of that case, and is alluded to in Judge Knapp's decision. 379 F. Supp. 679, 683 n. 1.

worthy of judicial deference because "there appears to be no factual basis upon which these regulations were drawn."[17] An examination of that testimony will show that Judge Henderson's statement was well founded.

Among other things, the testimony was that the EEOC knew of *no* medical studies concerning pregnancy which had been conducted by the EEOC prior to the issuance of the guidelines.[18] The testimony also indicated that the Commission was *not aware of any* financial studies concerning the impact of the guidelines on industry as a whole which had been made either by it or anyone else at the time the guidelines were drafted.[19] And, in spite of the fact that the EEOC was totally *unaware* of *any relevant data* collected by it or others, the Commission held no public hearings in connection with the development of the guidelines which might have elicited helpful information. Instead of being developed under the protection of any sort of procedural due process consistent within the concepts guaranteed by the Constitution, the 1972 guidelines were composed by one person who had no expertise in the field of medicine, economics or labor relations, and who was assisted by only four other people, including two law students employed as law clerks. Thus were the guidelines for American Industry in the area of maternity leave programs developed.

The false logic underlying the EEOC position is brought into clear focus by examining a dialogue conducted between the court and counsel for the EEOC in

17 374 F. Supp. at 245.

18 Appendix at 3a-8a.

19 Appendix at 5a-6a.

amination of how the 1972 guidelines came into existence. In its prefatory remarks to the guidelines published on April 5, 1972, the Commission stated:

> "Because the material herein is interpretive in nature, the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, opportunity for public participation, and delay in the effective date are inapplicable." (37 Fed. Reg. 6835, 6836) (April 5, 1972)

Having dispensed with the procedural safeguards which Congress clearly intended federal agencies to use when it enacted the Administrative Procedure Act, the EEOC then proceeded to have the guidelines published in the April 5, 1972 edition of the Federal Register within the pages entitled "Rules and Regulations," in a shocking attempt to clothe these writings with the dignity which this Court had given to earlier guidelines on job testing.

Where did the agency get the authority to issue guidelines in such a manner? The EEOC states it was by virtue of Section 713(b) of Title VII of the Civil Rights Act of 1964, U.S.C. Section 2000e-12(b). *See* 37 Fed. Reg. 6835. Section 2000e-12 sets forth as follows:

> *Regulations: Conformity of Regulations*
>
> With Administrative Procedure Act; Reliance on Interpretations and Instructions of Commission

> (a) The Commission shall have authority from time to time to issue, . . . suitable *procedural* regulations to carry out the provisions of the subchapter. Regulations issued under this section *shall be in conformity with the standards and limitations of the Administrative Procedures Act.*
>
> (b) In any action or proceeding based on any alleged lawful employment practice, no person shall be subject to any liability or punishment for, or on account of, (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with and in reliance on *any written interpretation or opinion* of the Commission . . . [Emphasis added.]

Section 2000e-12(a) authorizes the Commission to issue procedural regulations in conformance with the APA. Since the 1972 Guidelines are clearly substantive in nature, the EEOC has no authority to make such regulations under Section 2000e-12(a).

It looks to (b) where although it has no authority to make regulations there, it finds implicit power to issue "written interpretations and opinions," which do not have the same procedural limitations attached. It is difficult to believe that Congress intended procedural regulations of the EEOC to be promulgated in a Constitutional manner, and yet not afford the

same protection to *substantive* written interpretations, which obviously have a far greater impact on our society. Although it is difficult to understand why the EEOC appears eager to avoid compliance with the APA, it must, nevertheless, adopt the latter interpretation in order to avoid compliance and it has done so.

It is submitted that Congress never intended that the EEOC would promulgate substantive rules under the "written interpretation" clause of Section 2000e-12(b) and that the Commission has greatly overstepped its authority by doing so. There is certainly a great deal of difference between guidelines interpreting a portion of the statute which requires that testing be job-related, as in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and a naked declaration that a previously approved practice is *prima facie* unlawful. In *Griggs* this Court said that the guidelines there under consideration were entitled to great deference because "the Act and its legislative history support the Commission's interpretations," a remark which the opinion carefully documented.

It is submitted that the interpretive history of Title VII supports the conclusion that the failure to include pregnancy among covered disabilities in employment disability insurance coverage does not constitute "discrimination on the basis of sex" within the meaning of Title VII. The 1972 EEOC guideline to the contrary possesses none of the *indicia* of validity, was issued after no study or hearing, is otherwise wrong, and deserves no deference whatsoever. Rather, the contemporaneous position taken by the EEOC itself

prior to 1972 is a proper interpretation of the meaning of sex discrimination under Title VII as related to individualized treatment of pregnancy.

IV.

Even If The Non-Inclusion Of Pregnancy In A Sickness And Accident Disability Plan Is Sex-Based, Such Non-Inclusion Is Not Unlawful.

A. *The business necessity defense is applicable.*

As has been pointed out above, the non-inclusion of pregnancy among the covered disabilities in a sickness and accident disability plan does not constitute sex discrimination within the meaning of Title VII. Petitioner rested its case below principally on this ground and introduced substantial evidence regarding the excessive cost involved with pregnancy inclusion not in the way of a defense of business necessity, but to show that its motives were not pretextual. 519 F.2d at 667 n.23. While *Amici* Airlines agree with the Petitioner that the evidence adduced below conclusively shows lack of pretextual motivation, they also assert that such evidence presents a valid defense of business necessity. *Amici* assert that the crippling cost increases which would accompany pregnancy inclusion would destroy many of the plans as they are now constituted. Furthermore, these plans are built around insurance concepts and the pregnancy inclusion sought here is violative of many of the basic principles of insurance. *Amici* assert that the substantial business interest which employers have in maintaining the integrity of their plans as they are now

constituted is sufficient to amount to a defense of "business necessity." *Robinson v. Lorillard Corporation*, 444 F.2d 791 (4th Cir. 1971), *cert. dis.* 404 U.S. 1006.

Perhaps the most significant factor which justifies the maintenance of these plans as they are now constituted is the inordinate cost of including pregnancy benefits. Testimony in this case showed that the annual cost of the inclusion of pregnancy benefits in existing plans would amount to in excess of One Billion Dollars. More significantly, evidence has been adduced in other cases that pregnancy benefits would approximately *double* the current cost of short-term disability programs. (Such is the case in an action now pending in the Eastern District of Pennsylvania styled *EEOC v. Delta Air Lines, Inc.*, Civil Action No. 75-98). Although these factors alone are substantial, they become compelling when considered in relative terms. Since females currently receive a greater portion of the benefit dollar nationally, the inclusion of pregnancy benefits would significantly increase the disparity in compensation which already exists. Moreover, there does not appear to be any method by which this inequality could be rectified short of abolishing the programs. This Court should recognize and protect an employer's right to maintain the financial integrity of a compensation program which currently provides *fairly equivalent* benefits to both sexes.

B. ***Inclusion of pregnancy benefits is violative of the basic insurance concepts upon which sickness and accident disability plans are built.***

In the case of *EEOC v. Delta Air Lines, Inc., supra*, Actuary David M. Holland testified by affidavit that

the Defendant, in selecting the benefits to be provided without direct cost to its employees, did not select a number of possible coverages but instead chose to provide income protection to its employees "disabled as a result of demonstrable injury or disease". In a series of interesting observations dealing with insurance concepts, Mr. Holland set forth the basic principles necessary to guard the integrity of any plan of insurance. Certain of those observations are set forth below:

> In the very early beginnings of modern life insurance, insurance was based on the assessment principle. For a group of insureds, the insurance claims and expenses were equally divided (per capita) and assessed to all remaining in the group. Younger members of a group, who had a low expected value of benefit, tended to drop out of the group, and older individuals with a high expected value of benefit tended to try to join the group. As assessments increased, the size of groups decreased, and eventually many assessment plans ended in financial disaster. These plans suffered through antiselection on the part of their members. *Although assessment plans treated all members equally, they did not treat all members equitably.*

Thus, the real origin of modern life insurance was when certain "scientific" principles were applied to insurance.

a. One of the basic principles of insurance is equity. The premium charged for a risk

must bear a direct relation to the expectation of loss from the risk. . . .

Another principle of insurance is that the risk insured should represent a substantial loss, the timing of which is not definitely determinable in advance of the loss. If the risk is small in general but very close to the value of the premium payment, then the situation is more of a pre-paid expense than a transfer of risk via insurance. If the time of loss is definitely determinable in advance of the loss, then the situation is no longer a risk but is a certainty, and accordingly should be budgeted rather than transferred by insurance. . . .

Another principle is that the possibility of an insured selecting adversely against the insurer should be avoided. Obviously insurers would share the fate of assessment societies if they allowed a person who is on his deathbed to apply for insurance, to pay a small premium, and then for his beneficiary to receive a substantial benefit. Therefore, underwriting rules have been established to aid the insurer in selecting risks. . . . In group insurance, underwriting safeguards are also included; for instance,

(1) only certain types of groups are eligible,

(2) there must be a minimum number of people insured,

(3) if the coverage is optional, there are minimum participation standards,

(4) insurance should be incidental to the group,

(5) the amount of benefit should not be subject to individual selection,

(6) individual requirements such as being actively at work or completing a probationary period of employment are also used, and

(7) the benefits as designed should preclude individual selection.

The opportunity for claim abuse should be minimized. . . . (emphasis supplied)

After setting forth these basic principles of insurance which are necessary to the financial and equitable integrity of any plan, Mr. Holland analyzed the effects of the pregnancy inclusion sought by the Plaintiff upon the Defendant's plan:

. . . Addition of maternity benefits . . . . would violate the basic principles of insurance listed above.

a. Addition of maternity benefits would be inequitable in that it would increase the value of benefits to females, and as set forth above, the value of the benefits for

females is already greater than the value of benefits to males.

b. Although a person on maternity leave experiences a loss of income, the loss is not usually so substantial that it cannot be budgeted and time of the loss is fairly predictable. There is usually a period of months after conception where the individual can plan for the birth of a child, and often the general time of conception is planned so that the budgeting period may be even longer.

c. Whether to become pregnant and when to become pregnant are selections which are most often within the control of an individual female. Thus, there is an opportunity for a woman to select against an insurance program. For instance, if a woman learns of an insurance program which provides maternity benefits with no waiting period or only a short waiting period, she could apply for a job with the sole intent of obtaining maternity benefits.

d. With any disability insurance program, the possibility of claim abuse exists; however, if disability benefits are provided for maternity leave, the possibility rapidly approaches a certainty. Based on Delta records for 1970, 1971 and part of 1972, 30% of the employees who requested maternity leave did not return to work with

Delta. [These data omit employees who *indicated* they *would not* return to work.] Thus, providing disability benefits for maternity leave would be more like providing a special termination bonus for 30% of females taking maternity leave. Usually, disability benefits are for less than full pay so that there will be an incentive for the disabled employee to return to work; however, if a woman taking maternity leave has decided not to return to work, the fact that the benefit is less than the full pay provides no incentive to return to work.

It must be remembered when the above factors are considered that an employer does not provide disability coverage as a gift to its employees. Insurance protection is provided to employees as a part of compensation for work done. Certainly Title VII does not require an employer to be used as a stepping stone for an employee desiring to leave its employment and take up the duties of raising a family. Certainly it is a business necessity that an employer receive a *quid pro quo* for compensation provided. The number of employees who do not return to work following the birth of a child without the additional funds provided from disability insurance would almost certainly increase if those funds were available. This Court has never definitively set the parameters of the defense of business necessity. *Amici* Airlines urge that if those parameters are to be set within the confines of this action, they must take into account the financial and conceptual integrity of disability plans as they are now constituted.

CONCLUSION

For the foregoing reasons it is urged that this Court should reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing has been served on Petitioner and Respondents by depositing same in the United States mail, postage prepaid, properly addressed this ____ day of November, 1975.

GORDON DEAN BOOTH. JR.

APPENDIX A

Proceedings
Taken at the Offices of the
Equal Employment Opportunity Commission
Washington, D.C. 20506

Testimony of Sonia Pressman Fuentes (Called as a witness by Delta Air Lines in the Matter of *Newmon v. Delta Air Lines*, Civil No. 15681, Northern District of Georgia, on May 31, 1973, to give a deposition concerning the drafting and promulgation of the "EEOC Guidelines on Discrimination Because of Sex", issued April 5, 1972.)

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Whereupon

SONIA PRESSMAN FUENTES

was called for examination by counsel for the defendant, and having been first duly sworn, was examined and testified as follows:

Direct Examination
By Mr. Murphy:

Q. Please state your name for the record. A. My name is Sonia Pressman Fuentes.

* * * *

Q. By whom are you presently employed? A. By the Equal Employment Opportunity Commission.

* * * *

Q. What was your job with the Equal Employment Opportunity Commission? That is, commencing in 1965? A. I was a member of the General Counsel's Office.

* * * *

[12] Q. Approximately when did you become Chief of the Legislative Counsel Division? A. I gave you my best recollection. It was during the time Stanley Hebert was counsel, several years ago. I am sorry. I am not that good on time. Maybe two or three years ago.

Q. Did you continue in that position as Chief, Legislative Counsel up until this day, or have your responsibilities changed in the interim? A. No. I think commencing the first February of this year, that Division was abolished and I became an attorney in the trial litigation section.

Q. Now, do you recall meeting with me here at your office on or about May 4, 1973? A. I don't remember the date, but I did meet you.

Q. And at that time can you recall me asking you several questions concerning the development of the Equal Employment Opportunity Commission Guidelines which [14] are contained in Section 1604.10, I

guess it is of the Commission's Regulations and Guidelines . . . In fact, is this a copy of the Guidelines on Discrimination Because of Sex of the Equal Employment Opportunity Commission? A. It appears to be. It is. I don't know whether it is complete or not. They are published in the Code of Federal Regulations. I don't know whether this is complete. These are certainly some of the documents.

Q. I refer you specifically to the last page on the document and I refer you to specifically Section 1604.10 and I ask you if those are the . . . Guidelines with regard to Pregnancy and Childbirth which we discussed during my visit on May 4, 1973? A. Well, they are the Guidelines on Pregnancy and Childbirth. They are so entitled.

Q. At the time of my discussion with you in early May, can you recall me asking you if you participated in the development of these Guidelines with other attorneys [15] here of the Equal Employment Opportunity Commission? A. I recall that I said I was one of many Commission personnel who had participated in the formulation of the Guidelines.

Q. Can you recall me asking you at that time whether you knew of any medical studies which had been made in conjunction with the development of those Guidelines? A. As I recall, *I think you asked me whether the EEOC had conducted any medical studies and I think I recall saying to my knowledge it had not.* I think I also recall stating that there had been medical testimony, considerable medical testimony presented in Court cases which involved allegations of discrimination in connection with Employer

policies in the pregnancy area and I cited such court cases to you. I am trying to think of the name of it now. There was one case where there was considerable medical testimony pointing out that a woman can safely work when she is pregnant, and so on. *To my knowledge, EEOC had not itself made such studies.*

[17] Q. Can you recall me asking you at our conversation in early May whether or not the EEOC to your knowledge had conducted any studies with regard to the financial impact of the pregnancy and maternity leave guidelines? A. Well, [18] if there was such a study, since it was not made public, whether or not it was made would be a matter available to the general public; therefore I could not testify about it.

[19] Q. To refresh your memory, can you recall us discussing in early May a study about the financial impact of the Commission's Guidelines which had been made by a Bank [20] in the Boston area? A. I am trying to think. I think I have seen some write up but I don't recollect where, in a publication put out by Prentice-Hall. Prentice-Hall put out a study on leave policies in connection with maternity leave policies. *It might have contained some information on the cost.* There might also have been some information on that in a speech Jacqueline Gutwillig gave. She gave a speech in this area which has just been published. That might have contained some facts on cost. *I am just not sure.*

[21] Q. Are you aware of any studies which any one might have made with regard to the job performance

of pregnant women which based upon studies of work output in relation to other women in the work force? A. *The only information I have seen, or testimony or position, are in court cases.* As I recall, the testimony indicated that by and large pregnant women could perform as well as anyone else except in jobs requiring standing where the woman involved had difficulty with swelling of the feet or ankles.

[22] Q. Do you recall or do you know of any studies which have been made by anyone with regard to the psychiatric disorders which occur in pregnancy, including phobias, depression, psychoses, and emotional instability of pregnant women as it affect their job performance? A. This is the first time in my life that I have heard there are such things associated with pregnancy . . .

Q Can you recall having seen any studies having to do with the percentage of the female population with enters labor prematurely? A. No.

Q. Do you recall or are you aware of any studies which have concerned the phenomenon of a histal hernia occurring in pregnant women? A. That is the first time I have heard that is related to pregnancy, if it is.

Q. Have you ever seen or are you aware of any studies concerning urological problems of pregnancy as related to working women and the impact of frequent urination on job performance? A. I have seen no such study.

Q. Have you seen or are you aware of any studies with regard to the physical phenomenon of pregnancy, phenomena of pregnancy as they are related to job performance? A. That is a difficult question. With regard to studies, *I don't think so.*

Q. Are you aware of any hearings which were held, public hearings which were held in connection with the development of the Equal Employment Opportunity Commission's Guidelines on Employment Policies relating to pregnancy and childbirth? A. *No.*

[24] Q. Now, is it not true that the Equal Employment Opportunity Commission's position with regard to pregnancy and childbirth has changed since the effective date of the Civil Rights Act of 1964, which was July 2, 1965. A. Prior to the publication of these Guidelines on April 5, 1972, the Commission had no Guidelines on the matter of pregnancy and childbirth. There had been several Commission decisions in that area and the General Counsel's office had written some letters on that subject, but there had been no commission's position expressed in Guideline form until April 5, 1972.

[28] Q. Basically, do you recall my calling you up and telling you that I had a number of clients who were interested in the Commission's guidelines on discrimination because of sex, and that you said that there was another [29] woman, or man, I can't remember, another person who was primarily responsible in that area; at the present time, due to a change in positions, that you had with the Commission several

months before. A. I recall, I don't recall you saying that you had a number of clients who were interested. I got the impression from our conversation, of course it was a month ago, that you said you had some clients that were interested. There was a question in this area, that you wanted to come up with them, that somebody had given you my name, I can't recall exactly what I said, I think I would have said, *in the past my jurisdiction included the formulation of guidelines on behalf of the Commission,* but that was no longer within my jurisdiction and I believe I referred you to Issie Jenkins, a woman who was in charge of the office of legal counsel, who had that area within her jurisdiction. I think I might have mentioned she was out on leave in connection with the forthcoming birth of a child, and a man named John Goins was acting in her place . . .

* * * *

[46] Cross-Examination
By Mrs. Rindskopf:

Q. Do you know of any published studies indicating the incidence of premature birth in pregnant women? A. Do I know of any? What do you mean, "Do I know of any?" Do you mean, have I heard there have been any?

Q. Have you read or been informed of the results of any? A. To the best of my recollection, I have not read any such studies.

Q. I think I am correct if I stated that you were not aware of the problem of hiatal hernia in pregnancy? A. That is correct.

* * * *

Q. While you were functioning as Chief of the Office of Legislative Counsel . . . You enumerated a number of areas for which you had responsibility. One of the areas you stated was the drafting of rules, regulations and guidelines. Now, the guidelines to which you refer are those that are published from time to time in the Code of Federal Regulations, is that correct? A. They were published in the Federal Register. I think some of them find their way into the Code of Regulations.

Q. Will you describe the rules to which you referred: How do they differ from the guidelines? A. *I don't know that they do* . . .

Q. Was the first Guidelines, Sex Discrimination as it related to Pregnancy Leaves, issued on April 5, 1972? A. That is correct.

Q. Prior to that time there have been no Guidelines on that subject? A. No guideline rule or regulation, that is correct, although there have been Commission Guidelines on Sex Discrimination and on other subjects, published since 1965 or 1966 . . .

[59] Q. Has anything ever been published in the Federal Register that has not had the prior approval of both the General Counsel and the Commission? A. I don't know.

VEDDER, PRICE, KAUFMAN, KAMMHOLZ & DAY
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November 13, 1975

Gordon Dean Booth, Jr., Esq.
Troutman, Sanders, Lockerman
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1400 Candler Building
Atlanta, Georgia 30303

Re: General Electric v. Gilbert, et al.
Supreme Court of the United States
Nos. 74-1589 and 74-1590

Dear Mr. Booth:

Pursuant to your request, General Electric Company hereby consents to the filing of a brief *amicus curiae* in the subject case by Alaska Airlines, Inc., Aloha Airlines, Inc., Allegheny Airlines, Inc., American Airlines, Inc., Braniff Airways, Incorporated, Continental Air Lines, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., Hawaiian Airlines, Inc., Hughes Air Corp., d/b/a Hughes Air-West, National Airlines, Inc., North Central Airlines, Inc., Ozark Airlines, Inc., Pan American World Airways, Inc., Piedmont Airlines, Inc., Southern Airways, Inc., Texas International Airlines, Inc., Trans World Airlines, Inc., United Air Lines, Inc., Western Airlines, Inc., and Wien Alaska Airlines, Inc.

Very truly yours.

/s/ STANLEY R. STRAUSS
Stanley R. Strauss

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November 19, 1975

J. Stanley Hawkins
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1400 Candler Building
Atlanta, Georgia 30303

RE: General Electric Company v. Martha V. Gilbert, et al, Nos. 74-1589 and 74-1590

Dear Mr. Hawkins:

On behalf of Martha V. Gilbert, et al, Respondent in No. 74-1589 and Petitioner in No. 74-1590, we consent to the filing of a brief Amicus Curiae by you as counsel for the below listed clients in support of the position of General Electric Company in the above listed cases.

Alaska Airlines, Inc.
Aloha Airlines, Inc.
Allegheny Airlines, Inc.

American Airlines, Inc.
Braniff Airways, Incorporated
Continental Air Lines, Inc.
Delta Air Lines, Inc.
Eastern Air Lines, Inc.
Hawaiian Airlines, Inc.
Hughes Air Corp., d/b/a Hughes Airwest
National Airlines, Inc.
North Central Airlines, Inc.
Ozark Airlines, Inc.
Pan American World Airways, Inc.
Piedmont Airlines, Inc.
Southern Airways, Inc.
Texas International Airlines, Inc.
Trans World Airlines, Inc.
United Air Lines, Inc.
Western Airlines, Inc.
Wien Alaska Airlines, Inc.

Sincerely yours,

/s/ RUTH WEYAND
RUTH WEYAND
Counsel for Respondent in No. 74-1589 and Petitioner in No. 74-1590